No. 643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ALMA HELM AGAJAN, ET AL., *Petitioners*,

v.

RAMSEY CLARK, Attorney General of the United States as Successor to the Alien Property Custodian, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, nonenemy stockholders of Helm Bros., Ltd., a Crown Colony of Hong Kong corporation, United Kingdom, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 30, 1967.

OPINION BELOW

The opinion of the court of appeals (App. C, pp. 8a-14a) is reported at 95 W.L.R. 1317.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1967 (App. C, p. 17a). The jurisdiction of this court is under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances a notice of claim timely filed by their corporation which revealed the name, address, nationality and percentage ownership in the corporation of each stockholder may be treated as having been filed in the interests of and on behalf of nonenemy stockholders of said corporation who did not separately file individual notices prior to February 10, 1955, for the purpose of their satisfying such filing requirement in sections 9(a) and 33 of the Trading with the Enemy Act.

2. If not, whether the principle of equitable tolling of the period of limitatons for filing notices may be applied to the nonenemy stockholders on whose behalf in 1965 an application for the administrative return was made to the President of the United States, and also as to those nonenemy stockholders who individually and separately filed in 1965 a notice with respondent's predecessor.

3. Whether in the circumstances the Trading with the Enemy is unconstitutional as to the nonenemy stockholders whose interests in the vested assets will have been taken without compensation therefor if the decision below is upheld.

4. Whether nonenemy stockholders of a corporation which acquired status as an enemy only on the occasion of the occupation of Hong Kong in 1941 by the Japanese Army have an interest in the assets of that corporation vested under the Trading with the Enemy Act which they can recover in a suit brought under Section 9(a) of said Act.

Constitutional Provision and Statute Involved

The pertinent portions of the Fifth Amendment of the United States Constitution and of sections 9(a) and 33 of the Trading with the Enemy Act are set forth in Appendix A, pp. 1a-2a.

STATEMENT

In 1899, Helm Bros., Ltd. was organized as a Crown Colony of Hong Kong corporation, United Kingdom, to engage in commerce in the Far East. At the outset of World War II, it was engaged in the business of stevedoring, landing, shipping, customs brokerage and warehousing with its principal office in Yokohama, Japan. In 1941 and 1950 the capital stock of the company was owned by some 74 persons. (See App. B, pp. 3a-7a) No one person owned more than six per cent. The stockholders were of many different nationalities and were scattered around the world in the United States, England, Portugal, France, Australia, Switzerland, Germany and Japan. When war started in 1941, Helm Bros., Ltd. was the owner of certain bearer bonds and debt obligations at the time in the custody of the then Guaranty Trust Company of New York. By Vesting Order No. 16,313 dated December 8, 1950, the respondent's predecessor vested those assets as property in the United States belonging to a national of an enemy. (See 15 Federal Register 9549

and 16 Federal Register 1112) On July 22, 1951, Helm Bros., Ltd. filed a "Notice of Claim for Return of Property", Form APC 1-A. Accompanying the Notice was a complete list of all its stockholders as of December 7, 1941 and also believed to be stockholders on December 8, 1950. (App. B, pp. 3a-7a) The list revealed the name of each stockholder, his address, nationality and the percentage of his holding in the company. As no stockholder owned more than ten per cent of the outstanding stock, the disclosure of the identities and nationalities was not required by the claim form or the questionnaire which accompanied the form. Nevertheless, in listing all the stockholders, the notice contained as complete information as was then available as to the enemy and nonenemy status of the stockholders, thus providing at the time of the July 1951 filing respondent's predecessor with detailed notice of the nonenemy interests in the vested assets. It was not until July 22, 1964 that the Department of Justice completed final action on the administrative claim in denying an administrative return to the corporation. The corporation did not thereafter seek relief by filing suit in the United States District Court for the District of Columbia inasmuch as its standing to do so was controlled by *N. V. Handelsbureau La Mola* v. *Kennedy,* 112 U.S. App. D.C. 92, 299 F. 2d 923, cert. denied, 377 U.S. 940, decided in the 1960's while the administrative claim was pending. But the denial of the claim made it clear in 1964 that the percentage interest in the vested assets represented by the holdings of the nonenemy stockholders could not be recouped through corporate action.

Thereafter, three separate steps were taken by or on behalf of the nonenemy stockholders. By letter of

October 8, 1965 (JA 6) to the President of the United States application was made on behalf of the 1941 stockholders and their successors in interest who were not enemies or allies of enemies for the return of their prorata share of the vested assets. This application was denied subsequently in a letter signed by Assistant Attorney General of the United States John W. Douglas. On or about November 29, 1965 some thirty-three persons (JA 6) asserting their nonenemy character as stockholders filed individual notices of claims on the Form APC-1A. Subsequently on December 23, 1965, Assistant Attorney General John W. Douglas denied these claims. In both instances of denial, the explanation was given that Section 33 of the Trading with the Enemy Act proscribed a return unless notice of claim had been filed not later than February 9, 1955. The final step was the institution on November 30, 1965 of the suit with which this petition is concerned. The suit was brought by plaintiffs named therein for themselves and on behalf of all other persons and interests as a class who are or were stockholders who are or were neither enemies nor allies of enemies within the meaning of the Trading with the Enemy Act. Each stockholder by virtue of his nonenemy character at all pertinent times asserts as his interest in the vested assets that fraction of the total present dollar value of such assets which the number of shares owned by him bears to the total number of shares issued and outstanding. Thus, had stockholders succeeded below respondent would nevertheless retain the full share of the vested assets represented by the enemy interests. The district court, however, dismissed the complaint with prejudice on August 18, 1966 (JA 9) and the court below affirmed (App. C, p. 14a).

REASONS FOR GRANTING THE WRIT

I. The Question Is Important

Petitioners comprise a group of persons who are citizens of the United States, of Great Britain and of other countries which were allied to the United States in the World War II effort against the Axis, and of countries that remained neutral. It is beyond argument that as loyal citizens or friendly or neutral aliens their personal assets in the United States were beyond the grasp of the Trading with the Enemy Act for the obvious reason that they were not the enemy. Petitioners were, nevertheless, stockholders of Helm Bros. Ltd., a British company engaged in business primarily in Japan. Their company came within the definition of "enemy" when the Japanese occupied Hong Kong. Thereafter, assets of that company in the United States were subject to seizure. Its only assets in the United States were bearer bonds and evidences of indebtedness and these were vested on December 8, 1950, more than 5 years after actual hostilities had ceased. Their corporation undertook to obtain the return of those assets, an effort which stretched over some thirteen years, during which period, according to the Court below and specifically on February 9, 1955, the time ran out for the friendly stockholders to assert their separate claim by filing a notice, notwithstanding that their corporation which had filed a timely notice had included with it as full information as to the nonenemy or friendly interests as multiple individual notices filed by individual nonenemy stockholders would have supplied. Practically stated, the question is whether that part of the vested assets represented by friendly or nonenemy interests is, along with the part represented by

the enemy interest, to be paid into the War Claims Fund merely because individually and separately the same information that respondent's predecessor already had in his possession was not duplicated by individual notices filed by those friendly interests some time prior to February 10, 1955.

The question is important because if the answer is yes, the interests of petitioners in the assets, their right to an aliquot share, expired merely by the passage of time and their failure within that time to pursue an intermediate procedural step to duplicate information already in the Government's possession. As to them, therefore, the statute worked a forfeiture with the Government's appropriation permanently of their property interests without compensation in contravention of the Fifth Amendment.

The court below did not deal with the constitutional issue presented in petitioners' briefs. The point, however, cannot here be overlooked that a serious doubt exists whether the remedy in Section 9(a) as to these petitioners is an adequate one. The fact is that at all times since December 8, 1950 to the present the position of the respondent and his predecessors has consistently been that stockholders of a corporation the assets of which have been vested under the Trading with the Enemy Act do not have a severable interest that they may validly assert a claim to in a separate action brought by them under the Act. See the discussion of this question contained on pages 18-19 of this petition. A time limitation on taking appropriate action to protect an interest should not be subject to constitutional doubt if it is perfectly clear that the statute providing a remedy invests a claimant with a property

interest. But it is difficult to conclude that the statute clearly invests these petitioners with a property interest when the Government consistently has adhered to the position that nonenemy stockholders do not have an interest. The mere existence of a doubt as to the meaning of the Act constitutes a formidable handicap in the formulation of any plan to bring themselves within its provisions. The action of the Government in this case involves the exercise of the summary power of seizure of interests in property that petitioners claim belonged to United States citizens or citizens of allied or neutral countries. Accordingly, to deny petitioners the opportunity to assert their claim does raise a serious constitutional question. See *Becker Steel Company of America,* 296 U.S. 74, 79.

II. The Construction of an Important Federal Statute Is Involved

Section 9(a) of the Act was enacted as remedial legislation and petitioners urge that its provisions should be liberally construed to give effect to its remedial purpose. The Court below said, however: "But it would overstrain the structure and language of the Act to construe this notice [Notice of Claim filed by the corporation] as one filed by the shareholders. Neither the language of the Act nor elsewhere is their evidence of an intention on the part of Congress that a corporate entity should be considered to be identical with the individual entities who are its shareholders." (App. C, p. 10a) Thus, the Court adopted a literal, strict, formalistic test of compliance to exclude petitioners from a judicial remedy. It was petitioners' prime contention that they as stockholders should be regarded as claimants on whose behalf their corporation in 1951

filed a timely notice of claim.[1] Unless the statute is read to give effect to their contention, they will be without any remedy as Section 7 of the Act expressly states that "the sole relief and remedy . . . shall be that provided by the terms of this Act . . ." If the nonenemy stockholders are precluded from maintaining the suit because they literally failed to satisfy a procedural requirement of individually and separately filing notices, such application of the requirement works a serious hardship as to them and runs contrary to the spirit of *Kaufman* v. *Societe Internationale,* 343 U.S. 156 (1952), where this Court insisted that rights of innocent stockholders must be fully protected.

But courts of appeals and this Court have on past occasions recognized that improper results and hardships would be imposed by a literal reading of some provisions of the Act, and by liberal construction instead of literal and mechanical application of its language in areas other than the one involved in this case have aborted results that Congress never intended.

In *Guessefeldt* v. *McGrath,* 342 U.S. 308, 72 S. Ct. 338 (1952), the majority refused to apply a strict literal reading of the statute to deny a German national the opportunity to maintain a Section 9(a) suit. Justice Frankfurter, speaking for the majority, wrote:

> The concern with the Trading with the Enemy Act is with the problems at once complicated and

[1] In his well-known treatise the author noted that in numerous instances courts of equity look behind the corporation to recognize its rights as being in reality the rights of its stockholders and will not allow the legal fiction of a distinct corporate entity to obstruct justice. See *Clark on Corporations,* Hornbook Series, 3d Edition, p. 13.

> far reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wide latitude of construction in enforcing its purpose."

The importance of relief under Section 9(a) to nonenemy persons who became innocent victims of the Act in war was always to be stressed, an emphasis which the courts recognized as demanding a wide latitude of construction. In *Miller* v. *Robertson,* 266 U.S. 243, 45 S. Ct. 73 (1924), the Supreme Court construed broadly the former Section 9 permitting nonenemies to sue for debts to include in the definition of debt damages resulting from breach of contract. In applying the broader inclusive definition the Court said (266 U.S. 248):

> "* * * The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to nonenemy persons. The provision is highly remedial and should be liberally construed to effect the purpose of Congress and to give remedy in all cases intended to be covered. (citations omitted) The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations. (citation omitted)"

Clearly in the case at bar it was not the intention of Congress that nonenemy stockholders were to be stripped of their nonenemy interest when the full disclosure of those interests was on file as part of the Government's records in the case in 1951, simply because some time prior to February 10, 1955 each stockholder had not duplicated in a separate notice the in-

formation that the Government already had in its possession. The fact was that the Government already was on notice and the functions of notice that the filing of a notice of claim was to serve already had been fulfilled in July of 1951 by the unrequired disclosure of detailed information concerning stockholder interests.

In *Markham* v. *Cabell,* 326 U.S. 404 (1945), the Supreme Court in sustaining an action on a debt incurred after October 6, 1917 which was banned expressly by the terms of the unrepealed Section 9(e) of the Act said at page 409:

> "* * * The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate a seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United States,* 143 U.S. 457 illustrates. The process of interpretation misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The Seventh Circuit in *Kaku Nagano* v. *McGrath,* 187 F. 2d 759 (C.A. 7 1951), adopted a liberal construction of the language of the Act to give effect to the purpose of Congress. At page 765 the Court said:

> "* * *It is beyond question that in time of war the Executive . . . has been authorized to seize property whenever it is suspected that it may be enemy property, but Congress, though recognizing the necessity of the broadest power in this respect in the Executive, has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, nonenemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none. Such was the administrative policy expressed by the Custodian in his

> presentation to the Congressional Committee, where he said that on occasion he had found it necessary to vest property which he later discovered he was not entitled to keep. * * * He added that subsequent investigations might indicate that he had been mistaken, and, in such case, the property should be returned. * * *"

Thus, the court of appeals, in reversing and remanding, refused to apply literally the language of the then recently enacted Section 39 of the Trading with the Enemy Act that expressly barred a Japanese citizen because he was a national of an enemy country from exercising a statutory right to sue under Section 9(a) of the Act.

In *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C.A. 9, 1926), overruling the District Court's decree of dismissal, the court refused to apply a formalistic and literal reading of the statute and thus permitted a surgeon of German nationality who served the German Army in the Red Cross in World War I, to maintain an action under Section 9 of the Act. The court noted that although the surgeon's German nationality brought him within the literal definition of enemy, he was not brought within the spirit of the statute or the intention of Congress.

Although the court decisions discussed above did not construe the specific language in Sections 9 and 33 involved with this petition, their strong intimations favor a liberal reading of the provisions of the Act. A liberal interpretation of the condition to suit would preserve the remedy for stockholders who were eligible as neither enemies nor allies of enemies of bringing the district court action on November 30, 1965. In thus giving effect to the congressional intent of seizure and

retention of property belonging to enemies only, such liberal construction would be consistent with its remedial purpose. Such construction, it is submitted, would not impute to Congress an intention "that a corporation should be considered to be identical with the individual entities who are its shareholders," as suggested by the court below. Nor would it "overstrain" the meaning of the language. The decision sought to be reviewed here applied a strictly literal reading to foreclose the nonenemy stockholders from judicial relief, a construction which is inconsistent with past decisions by this court and other courts which refused to follow a strictly literal application of the statutory language. The extent to which the literal and narrow application by the lower court of the Act's remedial provision is inconsistent with prior decisions of this and other courts according a wide latitude of construction in enforcing its purpose provides an additional reason why this Court should grant certiorari.

III. The Decision Below Is in Other Respects Wrong

(a) According to the lower court's interpretation, a claimaint to be eligible under Section 9(a) to make formal application to the President for return must first have filed a notice of claim with the Alien Property Custodian. In thus reading the statute the court would have a claimant duplicate actions in the Executive Branch of the Government. But obviously, duplication of effort with its attendant hardship on claimants was not intended by Congress, as it would serve no meaningful purpose. Nor is such interpretation calling for duplication necessitated by the language of Section 9(a). That language is plain that a claimant who has made an application to the President may

then proceed to bring an action in the district court. The only question is whether Section 33 which became part of the Trading With the Enemy Act in 1946 cut off so far as these claimants are concerned a substantive right to sue in the district court. Petitioners contend that it did not and urge that the first sentence of Section 33 simply imposes a time limitation on the administrative return of property by the Alien Property Custodian, and in failing to require the filing of an application with the President some time within two years of vesting and not later than February 9, 1955 as condition to suit, Section 33 as enacted preserved such substantive right in Section 9(a).

(b) The court below interprets also erroneously the tolling provision in the second sentence of Section 33. The time within which the district court action below was instituted on November 30, 1965 was not due to happenstance. Petitioners were careful that their suit was instituted not later than two years from vesting, excluding the time (13 years) that their corporation's notice was pending. The language of the second sentence of Section 33 which is concerned with the time only for filing suit does not say, as the court below suggests, that the pending claim that tolls the period must be owned by the identical claimant or claimants who file the suit. A plain reading would inform the reader that if a suit or claim was pending the two-year period of limitation for bringing suit in the district court was tolled.

This additional confusing aspect of the interplay of Sections 9(a) and 33 has not to petitioners' knowledge been passed upon by this or any inferior court. But the inequities and hardships that a rigid application of their provisions was anticipated in a

comment in 62 Yale Law Journal 1210, 1232 where it was specifically said: "If no corporate suit is pending, a shareholder should be able to rely on previous 9(a) or 32 corporate action to toll the statute of limitations for his own section 9(a) suit." The article urged that the statute should be interpreted to extend the limitation period for shareholder actions subsequent to corporate claims or suit.

(c) Additionally, the decision below is in error in failing to treat the collective action of all the nonenemy shareholders who on October 6, 1965 filed an application to the President of the United States as tantamount to filing a notice of claim, for the purpose of meeting the condition to suit contained in Section 9(a). Petitioners urge that the collective action was taken on behalf of all nonenemy shareholders and was in addition to the action individually taken by some 33 nonenemy shareholders who separately filed notices of claim in November of 1965 and prior to instituting suit. The denial of the application to the President that was communicated by the Assistant Attorney General contained a recitation of the delegation by the President to him of authority to act regarding such claims as the applicants may have. If this court grants this petition and agrees with petitioners' contention, they urge that the collective action of October 6 be treated as fulfilling the condition precedent to suit of having filed a notice of claim, so that all nonenemy stockholders may be represented and not just those who individually in 1965 filed notices.

(d) Petitioners contend that the disposition by the lower court of the issue of equitable tolling is erroneous and contrary to the holding by this Court in

Honda v. *Clark*, 386 U.S. 484, (1967). Admittedly, the *Honda* involved creditors' claims under Section 34 of the Act concerning which the Supreme Court found an analogy to the Bankruptcy Act that pointed the way to the decision. The instant case, of course, differs in that it arises out of a title claim under Section 9 of the Act and the identical analogy would not apply. Petitioners, nevertheless, urge that the pronouncement in *Honda* on the equitable tolling principle should be applied with even greater force as to them to toll the period for taking administrative action while the corporate notice was pending. If this Court permits the period to be tolled for petitioners, it is submitted that the period of limitation for appellants to file administratively a notice of claim was the time between the date of vesting (December 8, 1950) and February 9, 1955 (as stated in Section 33 of the Act) reduced by the number of days between December 8, 1950 and July 22, 1951 (the date that Helm Bros., Ltd. filed its administrative notice of claim). The tolling of the period of limitation as to appellants would then be lifted July 22, 1964 when the corporate administrative claim was finally dismissed, and thereafter until the bringing of the suit below or the filing of further administrative claims. If this Court permits the tolling, it is submitted that the action taken on October 8, 1965 in making an application to the President of the United States and the action of some of the appellants who individually filed notices of claim with the Office of Alien Property should be construed as satisfying the condition precedent to the suit below.

The circumstances of nonenemy stockholders of Helm Bros., Ltd. provide a stronger case for tolling than were involved in *Honda*. In the case of the latter the claimants who were depositors individually were

actually notified by the Office of Alien Property of the vesting of their interests and thereafter were again notified that they had 60 days after the publication of the schedule of payments to bring suit. In most cases the claimants personally received such warning. In the case of the nonenemy stockholders of Helm Bros., Ltd., however, no such notification or warning ever was given to the American and nonenemy stockholders, although the existence of their interests was fully known to the Office of Alien Property when the corporation in July of 1951 filed a notice. Apparently, the reason for not serving warning that rights to nonenemy interests that were vested would expire on February 9, 1955 was that the appellee's predecessor refused to recognize that nonenemy stockholders had any protectable interest in such assets, although he must have known that as of November 23, 1953 at least one judge of the District Court of the Southern District of New York had ruled that a stockholder of an enemy-domiciled corporation may have the value of his stock out of the assets of said corporation seized pursuant to the Act. (App. D, pp. 15a-16a) As the nonenemy interests were without any notice at all, the reason for invoking the equitable doctrine of tolling is stronger than in *Honda*.[1]

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[1] The court below apparently was influenced by stockholder reliance on the notice filed by their corporation which subsequently "did not succeed in freeing itself of enemy character." (App. C, p. 14a) The court, however, made that observation without the benefit of knowing that on March 19, 1942, the assets of the corporation were placed under the control of a Japanese enemy property custodian by order of the Minister of Finance in accordance with the Enemy Property Custody Law. After the cessation of hostilities, on November 17, 1950 the Supreme Commander for Allied Powers directed the Minister of Finance to take necessary action to remove the custodian from commercial registration of the corporation, and to restore the vested assets to their owner, in ac-

Although there are dissimilarities in *Honda* and the instant case, it is apparent, nevertheless, that the basic considerations that induced this Court to toll the period of limitation for depositors in *Honda* while the *Abe* action was pending are applicable in the instant case.

IV. The Court Should Decide That Nonenemy Stockholders Have an Interest That They May Independently Assert

Should this Court reverse the lower court either by holding that the notice of nonenemy interests contained in the notice filed by the corporation in 1951 was a sufficient compliance with the notice filing requirement, or that the time for filing a notice was tolled for the period that the corporate notice was pending, petitioners urge this Court to resolve at this time the question which the lower court did not reach, namely whether nonenemy stockholders of an "enemy" corporation have standing to bring an action for an aliquot share of the vested assets.

It appears that this issue was litigated at district court levels in only two instances. In memorandum decision in a preliminary proceeding in *Taterka* v. *Brownell* Civ. 85-31, S.D.N.Y. 1953 (unpublished), (See App. D, pp. 15a-16a), Judge Sidney Sugarman ruled that a nonenemy stockholder of an enemy-domi-

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cordance with procedures for the restoration of property in Japan to nationals of the United Nations. By 1952 all assets in Japan were restored to the corporation, and additionally the Japanese Government paid some 30 million yen in reparations to the company. Little wonder is it, therefore, that stockholders could reasonably rely on their corporation as a national of the United Nations to retrieve assets in the United States. Additionally, it was not until 1964 that the determination of the ineligibility of corporations similarly situated to recover in a section 9(a) suit was finally made. See *N.V. Handelsbureau La Mola* v. *Kennedy, supra.*

ciled corporation may have the value of his stock out of the seized assets, and relied upon the decision of this court in *Kaufman, et al.* v. *Societe Internationale, supra. Albert* v. *McGrath,* 104 F. Supp. 891 (S.D. Cal. 1952), vacated on other grounds, 219 F. 2d 602 (C.A. 9, 1954) was a holding that under the *Kaufman* decision nonenemy stockholders do have a severable interest but only if they are in fact nonenemy stockholders of a nonenemy corporation.

Petitioners assert that the narrow interpretation of *Kaufman* by the district court in *Albert* v. *McGrath* was erroneous. Although the decision in *Kaufman* involved stockholders of a corporation (Interhandel) organized under the laws of Switzerland, a neutral country, the basic arguments advanced by the Government in opposition would apply with equal force were the petitioners in that proceeding stockholders of an enemy corporation. No distinction was made either in the briefs [1] or the opinion, and it is submitted, none should exist.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 1967

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[1] Supreme Court, U.S., Transcript of Records and File Copies of Briefs, Vol. 45, Case No. 172.